

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

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|------------------------|---|-------------------------------|
| ARTHUR LEE WHITFIELD, |) | |
| AIS # 158061, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | CIVIL ACTION NO. 1:07cv39-WHA |
| |) | (WO) |
| BILLY MITCHEM, et al., |) | |
| |) | |
| Respondent. |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

On September 11, 2008, the Magistrate Judge filed a Recommendation in this case, and on September 26, 2008, Arthur Lee Whitfield filed his objections. Whitfield objects that the Magistrate Judge incorrectly observed that he failed to file a response to this court's February 1, 2007, order advising him of his procedural defaults. Whitfield is correct; the record indicates that he filed a response to this court's order on February 15, 2007. (Doc. No. 9.)

Rather than return this case to the Magistrate Judge, the court has considered the arguments in Whitfield's response and concludes that one contention merits discussion. In his response, Whitfield argues that cause exists to excuse his failure to file an application for a writ of certiorari in the Alabama Supreme Court because he believes that petitioning that court for discretionary review would have been futile. Whitfield's assumption that the Alabama Supreme Court would have rejected his claims does not establish cause for his default. Whitfield's failure "to exhaust state remedies that are no longer available . . . is a procedural default which will bar federal habeas relief, unless either the cause and prejudice

or the fundamental miscarriage of justice exception is established.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 848-49 (1999). *See also Smith v. Jones*, 256 F.3d 1135, 1138-39 (11th Cir. 2001). Futility does not constitute cause for a procedural default. *See, e.g., Bousley v. U.S.*, 523 U.S. 614, 623 (1998). Whitfield neither shows cause and prejudice nor satisfies the miscarriage of justice exception to excuse his default. This court therefore concludes that Whitfield is entitled to no relief with respect to this argument.

Upon an independent review of the file in this case and upon consideration of the Recommendation of the Magistrate Judge and the petitioner’s objections, it is

ORDERED that Whitfield’s objections be and are hereby OVERRULED and that the Recommendation be and is hereby ADOPTED except as to the observation that Whitfield did not file a response as more fully explained in this opinion.

Done this 1st day of October, 2008.

/s/W. Harold Albritton
SENIOR UNITED STATES DISTRICT JUDGE